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STATE OF MICHIGAN
SUPREME COURT
ON APPEAL FROM THE COURT OF APPEALS
Judges Holbrook, McDonald and Saad

CAROL HAYNIE, Personal Representative for the ESTATE OF VIRGINIA RICH, Deceased,

Plaintiff-Appellee,

v

THE STATE OF MICHIGAN, THE MICHIGAN DEPARTMENT OF STATE POLICE, DANIEL KECHAK, AND DANIEL PAYNE, Jointly and Severally,

Defendants-Appellants,

Supreme Court No. 120426

Court of Appeals No. 221535

Ingham County Circuit Court
File No. 97-87491-NZ
Hon. Lawrence M. Glazer

APPELLEE'S BRIEF ON APPEAL

*****ORAL ARGUMENT REQUESTED*****

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STATEMENT OF FACTS

On January 17, 1997, decedent Virginia Rich (hereinafter, "decedent") was shot and killed by a fellow Michigan State Capitol Security officer, Canute Findsen (hereinafter, "Findsen") while both were on duty. (Plaintiff's First Amended Complaint, para. 37). Decedent also shot and killed Findsen during the same time period. The State Capitol Security Officers are a unit within the Michigan Department of State Police. During decedent's employment, Plaintiff claims decedent was subjected to many incidents of offensive comments and conduct due to her gender and weight. The harassment toward the decedent came primarily from Findsen. However, he was not the only Capitol security officer to harass the decedent. Although, the decedent filed complaints of harassment and had requested not to work with Findsen, they ignored all her complaints, which presumably ultimately lead to her death.

The Decedent began her employment as a Capital Security officer with the Michigan State Police in 1976. Appellee claims that Findsen held a strong belief that females did not belong in law enforcement. Findsen also believed the decedent was too heavy to be an effective law enforcement officer. Findsen's opinion concerning females in law enforcement was common knowledge at the Capitol Security Guard Post. This belief precipitated the harassment of the decedent and other female Capitol security guard officers by Findsen.

The decedent's father had committed suicide several years before the decedent's death by shooting himself in the head with a handgun. That suicide became known to many of decedent's fellow employees, including Findsen.

On one occasion, Findsen left a note and a bullet in the decedent's locker. The note stated in effect that decedent kill herself "using the bullet in her daddy's gun." On at least one

other occasion, Findsen showed a bullet to the decedent and asked her to use it on herself.

It was well known within the Capital Security Guard Unit that for some time before her death, the decedent secretly carried a tape recorder hidden on her person during her work hours.

It was common knowledge at the Capitol Security Pool that the decedent and Findsen did not get along. It was also common knowledge that Findsen regularly teased and made inappropriate remarks to decedent's face and behind her back. The Appellee is claiming that at least some supervisors knew of this harassment.

On the night of the shooting, the decedent and Findsen were both working. At some point, the two of them checked out a patrol car to "make the rounds" on several buildings located away from the Capitol post. Eventually, they arrived at the Collins Road State Police facility in Lansing, Michigan. Subsequently, the decedent and Findsen exited the vehicle and shot and killed each other. The internal state police investigation of the shooting was inconclusive as to who instigated the shooting.

On December 8, 1997, Plaintiff-Appellee, personal representative and sister of the decedent, filed a complaint against Defendants-Appellants, the State of Michigan, the Michigan Department of State Police, Daniel Kechak, and Daniel Payne (decedent's supervisors) on the basis of offensive work environment due to decedent's gender and weight, and sexual and weight discrimination under Michigan's Elliot Larsen Civil Rights Act, MCL 37.2101, *et seq*, MSA 3.548(101), *et seq*, (hereinafter, "ELCRA"). Appellee's claims arise out of her employment as a Capitol Security Officer with the Michigan Department of State Police. (Complaint, para. 24, 25, 26). Plaintiff-Appellee also filed a two-count complaint in the Michigan Court of Claims alleging wrongful death and negligent hiring and supervision joined with this case. (Order of

Joinder dated 12-8-97). An Order of Partial Dismissal of the Court of Claims action was entered with the trial court on February 4, 1998.

Defendants-Appellants filed a total of three Motions for Summary Disposition seeking dismissal of Plaintiff's-Appellees' claims on various legal grounds. Appellee responded to the First Motion for Summary Disposition by filing her First Amended Complaint. (Plaintiff's First Amended Complaint, February 19, 1998). Instead of filing their Answer, Appellants filed a second Motion for Summary Disposition.

On April 8, 1998 a hearing on Defendants-Appellants Second Motion for Summary Disposition was granted in part by dismissing Plaintiff's sex hostile work environment claim. Plaintiff-Appellee's weight discrimination claim remained open due to insufficient time to orally argue the issue of weight discrimination. (Order of Partial Dismissal, pg. 2). The trial court ordered that the weight discrimination claim be re-noticed to June 24, 1998. Defendants-Appellants also filed a Motion for a Protective Order to limit discovery. (Motion for Protective Order, dated March 11, 1998). The trial court granted the Protective Order prohibiting any discovery on this claim. (Protective Order, dated April 23, 1998). There was a complete bar on any discovery until the July 8, 1998 order, which then limited discovery to the weight discrimination claim only. (Order dated July 8, 1998).

Plaintiff-Appellee filed a Motion for Rehearing and Reconsideration of the lower court's decision to dismiss Appellee's sex discrimination/hostile work environment claim. (Motion for Rehearing and Reconsideration, dated May 4, 1998). However, the trial court refused to grant a rehearing. (Order Denying Motion for Rehearing and Reconsideration.)

On July 2, 1998, the Defendants-Appellants filed an Answer to Plaintiff-Appellee's

Amended Complaint. On July 8, 1998, the trial court ordered that Defendants-Appellants Third Motion for Summary Disposition be granted in part, and dismissed the individually named Defendants, Daniel Kechak and Daniel Payne, as parties to the action. The trial court denied Plaintiff-Appellee an opportunity to amend her complaint. The trial court also ordered that the Protective Order prohibiting discovery be set aside and discovery be allowed on the issue of weight discrimination only. The trial court allowed the weight discrimination/hostile work environment claim to continue. (Order dated July 8, 1998).

Plaintiff-Appellee did state a claim upon which relief can be granted, by sufficiently alleging the necessary elements for her cause of action as required by MCR 2.116(C)(8). However, the Trial Judge ruled that additional facts were needed even though he issued a Protective Order denying any discovery on the matter. (Order dated 7/8/99). Considering the fact that the victim is deceased, discovery was imperative to decide precisely what happened. The trial court denied Plaintiff-Appellee discovery for a three-month period which unduly burdened her case.

The Plaintiff-Appellee filed an Application for Leave to Appeal of the trial court's decision to dismiss the hostile work environment claim on July 29, 1998. The Court of Appeals denied Appellee's Application for Leave to Appeal on December 24, 1998. Discovery continued on the weight claim until this case was adjudicated in final by Stipulation and Order dismissing the weight claim without prejudice on July 22, 1998.

On Appeal, Plaintiff argued that a hostile work environment claim had been sufficiently pled. Further, that the Trial court committed reversible error when it granted Defendant's Motion for Summary Disposition. On September 28, 2001, the Court of Appeals reversed the

Trial Court's decision and held that Plaintiff had set forth a prima facia claim of hostile work environment claim.

The Defendant subsequently filed an Application for Leave to Appeal with this Court, which was granted on July 2, 2002.

ARGUMENT

I. THE DEFENDANTS' CONDUCT SUBJECTED THEM TO POTENTIAL LIABILITY UNDER A HOSTILE WORK ENVIRONMENT CLAIM PURSUANT TO THE ELLIOT-LARSEN CIVIL RIGHTS ACT, MCL 37.2101, ET SEQ.

A. The Trial Court Failed to Recognize Michigan and Federal Case Law Requirements For Establishing A Prima Facia Case For Hostile Work Environment Claim Based on Gender When it Granted Defendants-Appellants Motion for Summary Disposition.

The Appellants in their Brief are attempting to impermissably narrowly argue that the Elliott-Larsen Civil Rights Act ("ELCRA"), MCL 37.2101, et seq., doesn't apply to this case since it does not identify any unwelcome sexual advances or other verbal or physical contact or communication of a sexual nature. The Defendants are asking this Court to ignore both state and federal precedent for establishing a prima facia claim of a hostile work environment.

The ELCRA, MCL 37.2102(1) states:

> Sec. 102. (1) the opportunity to obtain employment, housing, and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status as prohibited by this act, is recognized and declared to be a civil right.

Thus, ELCRA specifically addresses protected classes in addition to sex. The same analogy applies to these specifically delineated classes regarding hostile work environment. If this Court follows Defendant's reasoning, then it undermines completely that basis for a hostile work environment based on sex. In effect, the Defendants are asking this Court to ignore the protected classes including sex that are contained within the ELCRA. To do so would circumvent the legislative interest of the statute and blatantly overturn this Court's decision in

Radtke v Everett, 442 Mich 368, 501 NW2d 155 (1993), and in *Koester v City of Novi*, 458 Mich 1; 580 NW2d 835 (1998).

The establishment of a hostile work environment because of one's gender is just as offensive as conduct or comments that are of a sexual nature. The Appellant is asking this Court to only apply ELCRA to acts of a sexual nature and ignore offensive conduct and comments due to the decedent's sex, i.e., gender. In effect, the Appellant is asking this Court to legistrate by narrowing the scope of ELCRA. If the legislature was offended by the Koester decision, then it could have taken steps to change the statute. It has chosen not to do so.

Federal and Michigan Courts are increasingly recognizing claims for workplace harassment that go beyond traditional sexual harassment cases. In the recent United States Supreme Court decision of *Oncale v Sundowner Offshore Services, Inc*, 118 S Ct 998 (1998) the court held that Title VII prohibits sexual harassment even when the harasser and harassed employee are members of the same sex. In a similar case of *Downey v Charlevoix County Bd of Road Comm'rs,* 227 Mich App 621, 576 NW2d 712 (1998) *app dis* 586 NW2d 88 (1998) the Court of Appeals held that Michigan law prohibits harassment based on age and handicap.

In the instant case, the Plaintiff-Appellee has taken the position that Michigan and federal law should prohibit harassment based on gender. In *Downey*, the court followed *Malan v General Dynamics Lands Systems, Inc*, 212 Mich App 585; 538 NW2d 76 (1995), which held that harassment based on any of the enumerated classifications in the Elliott-Larsen Civil Rights Act is an actionable offense. The *Downey* court noted that its holding was consistent with federal cases which have recognized claims for harassment based on age under the Age Discrimination and Employment Act, 29 USC 623, and handicap under the Americans with

Disabilities Act, 42 USC 12101, *et seq.*

In *Malan*, the court held:

> MSA § 3.548(202)(1)(a) states that an employer shall not do any of the following:
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.
>
> MCL 37.2103(I); MSA 3.458(103)(I) elaborates by stating in pertinent part:
> Discrimination because of sex includes sexual harassment which means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature. . . .
>
> Defendant contends that nothing in the above sections makes harassment illegal. Defendant contends that of the nine protective civil rights listed in the act protection from harassment is extended only to the category of sex.
>
> **We find however, that harassment based on any one of the enumerated classification is an actionable offense**. (Emphasis added) *See, e.g., Rasheed v Chrysler Corp*, 445 Mich 109; 517 NW2d 19 (1994), (religion-based harassment from co-workers and supervisors); *Sumner v Goodyear Tire & Rubber Co,* 427 Mich 505, 538, 392 NW2d 368 (1986), (race-based harassment from supervisors as a continuing violation); *Meek v Michigan Bell Co*, 193 Mich App 340, 342-343; 483 NW2d 407 (1992), (sex-based and religion-based harassment from supervisors); ef *Barbour v Dep't of Social Services*, 198 Mich App 183, 185; 497 NW2d 216 (1993), (holding that sexual-orientation-based harassment, a nonenumerated classification, is not proscribed by the act).
>
> It appears that when the Legislature enacted MCL 37.2103(I); MSA 3.548(103)(I), (defining sexual harassment), it did not intend to limit a cause of action for harassment to one based solely on harassment of a sexual nature. *See* House Legislative Analysis, HB 4407, February 25, 1980.

> The act seeks to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases. Cf. *Boutros v Canton Regional Transit Authority*, 997 F2d 198, 200 (CA 6, 1993) (finding that national origin harassment is actionable under 42 USC § 1983)

In *Downey*, the court of appeals ratified the ruling in *Malan* as follows:

> We are bound to follow *Malan* pursuant to MCR 7.215(H), and would follow it in any event because we believe that *Malan* correctly held that harassment based on any of the enumerated classifications in § 202(1)(a) is an actionable offense. As noted in *Malan*, *supra*, p 587, the Civil Rights Act seeks to eliminate the effects of offensive or demeaning stereotypes, prejudices and biases. Morever, *Malan* is consistent with the overwhelming weight of authority in the federal courts. The federal courts have recognized that harassment based on age is actionable under the Age Discrimination in Employment Act, 29 USC 623. *Sischo-Nownejad v Merced Community College Dist*, 934 F2d 1104 (CA 9, 1990); *Dunn v Medina General Hosp*, 917 F Supp 1185 (ND Ohio, 1996). The federal courts have also recognized that handicap harassment is actionable under the Americans with Disabilities Act, *Haysman v Food Lion, Inc*, 893 F Supp 1092 (SD Ga, 1995); *Henry v Guest Services Inc,* 902 F Supp 245 (D DC, 1995); *aff'd* 98 F3d 646 (DC Cir, 1996). The fact that handicap is not a listed classification in § 202(1)(a) of the Civil Rights Act is not dispositive, because, like the federal courts, we recognize a claim of handicap harassment or hostile work environment under the Handicapper's Civil Rights Act (HRCA), MCL 37.1202; MSA 3.550(202).

The Defendants-Appellants in this case argued that *Koester v City of Novi*, 213 Mich App 653; 540 NW2d 765 (1995) *aff'd in part, rev'd in part*, 458 Mich 1, 580 NW2d 835 (1998) requires a different holding. However, the court in *Downey* further addressed Appellant's argument when it held:

> Accordingly, with the rulings of the federal courts and *Malan* in mind, we hold that harassment or hostile work environment based on age and handicap is actionable. Contrary to defendant's argument, this Court's decision in *Koester* does not compel a

> different ruling. In *Koester*, this Court merely held that gender-biased comments to a female employee concerning pregnancy, career choice, and child rearing are not comments "of a sexual nature" that create a hostile work environment under MCL 37.2103(I); MSA 3.548(103)(I), which statute deals specifically with sexual harassment. Therefore, we find no conflict between *Malan* and *Koester*, and conclude that *Koester* only holds that claims based on sexual harassment must be of a "sexual nature" to be actionable, which is consistent with the wording of the statute.

The elements for a hostile work environment/sexual harassment claim were set forth in *Radtke v Everett*, 442 Mich 368; 501 NW2d 155 (1993). It is Plaintiff-Appellee's position that by analogy the following are required to meet this prima facie burden for gender and weight harassment hostile work environment claim: (1) the decedent belonged to a protected group; (2) the decedent was subjected to communication or conduct on the basis of her sex; (3) decedent was subjected to unwelcome conduct or communication based on her weight and/or gender; (4) the unwelcome conduct or communication was intended to and did substantially interfere with the decedent's employment or created an intimidating, hostile or offensive work environment; and (5) the Appellants are liable on the basis of respondeat superior.

The Plaintiff-Appellee has properly pled each and every one of these elements in her First Amended Complaint. First, the decedent was a member of a protected class, i.e., a female and overweight. (¶13, First Am Comp)

Second, the Plaintiff-Appellee has alleged that the decedent was subjected to harassment on the basis of her gender and weight. (¶¶14-24, First Am Comp) Defendants-Appellants argued that the conduct at issue was not sexual in nature. However, that is an issue of fact that should be developed as discovery progresses. The Plaintiff-Appellee has pled sufficient allegations of harassment to state a claim.

Third, the Plaintiff-Appellee has also properly alleged that the decedent was subjected to unwelcome conduct or communications based on her gender and weight. (¶¶ 16,17, First Am Comp)

Fourth, as in, *Radtke* the crux of this case is whether the conduct was intended or in fact did substantially interfere with Plaintiff-Appellee's employment or created an intimidating, hostile, or offensive work environment. The *Radtke* Court held as follows:

> The essence of a hostile work environment action is that "one or more supervisors or coworkers create an atmosphere so infused with hostility towards members of one sex that they alter the conditions of employment for them." *Lipsett v Univ of Puerto Rico*, 864 F2d 881, 897 (CA 1, 1988). Hence, "a loss of a tangible job benefit is not necessary since the harassment itself affects the terms or conditions of employment." *King v Bd of Regents of Univ of Wisconsin System*, 898 F2d 533, 537 (CA 7, 1990). This is so because the employer can thus implicitly and effectively make the employee's endurance of sexual intimidation a condition of her employment. *Bundy v Jackson*, 641 F2d 934; 205 US App DC 444 (1981).

Finally, the Plaintiff-Appellee has properly alleged that the Defendants-Appellants relationship with the decedent was that of respondeat superior.

The Appellant's reasoning would preclude a claim under ELCRA if a woman is denied housing or employment based on her gender. MCL 37.2103(i)(iii) specifically provides:

> (i) Discrimination because of sex includes sexual harassment. Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
>
> * * *
>
> (iii) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment, ... or creating an intimidating, hostile, or offensive employment ... environment.

The Defendants' conduct towards the decedent certainly created a hostile and offensive employment environment.

B. Defendants-Appellees Third Motion for Summary Disposition Brought Pursuant to MCR 2.116(C)(8) Was Granted by The Trial Court Under The MCR 2.116(C)(10) Standard.

The trial court committed reversible error when it held Plaintiff-Appellee to a sexual harassment standard only. At oral arguments on the motion, the trial court and Appellee's counsel engaged in the following discussion:

> THE COURT: No, what you have to do is state sufficient facts to state a claim of sexual harassment. That's what you have to do and I don't think you disagree with that.
>
> (Tr Oral Argument, pg 18)

Appellee's counsel admitted at oral argument that Appellee did not have any facts that the decedent was subjected to sexual harassment as set forth in *Radtke*.

> THE COURT: Not that they were - - not gender motivated, but whether or not they were sexual in nature.
>
> MR. BOOG: They were not sexual in nature.
>
> THE COURT: Now, what case law do you have that says that making someone's life miserable which is gender motivated, but not sexual in nature is a violation of Elliott-Larsen?
>
> MR. BOOG: I feel that Radtke stands for that, your Honor. It's implied that if it's based upon their sex, their gender - -
>
> THE COURT: What case?
>
> MR. BOOG: Radtke, that that creates a hostile work environment which is - - I think is self-evident, and it ultimately led to their deaths.
>
> (Tr pgs 19, 20)

Appellee's counsel preserved their objection when he stated to the Court:

> MR. BOOG: . . . My objection is, Your Honor, they are basing Koester, Radtke, any of these cases cited, they are all (C)(10) motions, and we can show through discovery and we are allowed to do that if we claim we are doing that, but I have pled the elements. I don't have to plead each and every fact known to us, I just have to put them on notice, and they are certainly on notice of what our claim is.
>
> (Tr. Pgs 20, 21).

The trial court rendered its decision to dismiss Appellee's hostile work environment claim when it stated:

> THE COURT: Be seated. Now that Plaintiff's counsel has clarified for me the theory of this action, I am in a position to decide whether the pleadings state a cause of action on behalf of the Plaintiff.
> As I understand it, Plaintiff's theory is that the deceased was subjected to a number of unkind, nasty, hostile statements and activities, some of which may have been partially motivated by the fact that she was a female, but none of them were sexual in content.
>
> The Radtke versus Everett case decided by the Supreme Court in 1993 states that there are, quote, "five necessary elements to establish a prima facie case of a hostile work environment. Number one, the employee belonged to a protected group," close quote. That's alleged here. Number two, quote, "the employee was subjected to communication or conduct on the basis of sex," close quote. I take it that sex in that context to mean gender. That's alleged here. Number three, quote, "the employee was subjected to unwelcome sexual conduct or communication," close quote, "the unwelcome sexual conduct or communication was intended to or, in fact, did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment." close quote. That's not alleged here, and the fifth is not here, respondeat superior. That standard is found at pages 382 and 383 of the Radke versus Everett opinion.
>
> It is my understanding that all of these must be alleged in order to bring an action under the Elliott-Larsen Act for hostile work environment sexual harassment and some of those elements have not been pled, and therefore, the motion must be granted.
>
> (Tr. pgs 22, 23)

The trial court ignored Appellee's argument that *Radtke* by analogy, and the subsequent cases

cited below, would allow Appellee to proceed with her gender/hostile work environment claim.

Although the lower court granted Defendants-Appellant's Third Motion for Summary Disposition under MCR 2.116(C)(8), it was incorrectly based on a MCR 2.116 (C)(10) standard. The lower court relied on the cases cited by the Defendants-Appellants in their Brief in Support of their Second Motion for Summary Disposition. Those cited cases involved MCR 2.116(C)(10) motions after discovery was completed. In essence, Plaintiff-Appellee was unjustly held to a MCR 2.116(C)(10) standard on a (C)(8) motion. This was a reversible error by the trial court.

A Motion for Summary Disposition pursuant to MCR 2.116(C)(8) states: "the opposing party has failed to state a claim on which relief can be granted." Under a (C)(8) Motion, the court may only consider the pleadings when considering a motion to dismiss a claim based upon the plaintiff's alleged failure to state a claim upon relief which may be granted. A party fails to state a cause of action when the pleadings allege a cause that has been abolished by law, case law has refused to recognize the cause, or plaintiff has failed to allege a necessary element of the cause. *Rowbotham v Detroit Auto Inter-Ins Exchange,* 69 Mich App 142; 244 NW2d 389 (1976). Furthermore, a motion for summary disposition pursuant to MCR 2.116(C)(8) should only be granted when the claim is so clearly unenforceable as a matter of law, that no factual development could possibly justify recovery. *Monroe Beverage Co, Inc v Stroh Brewery Co,* 211 Mich App 286; 535 NW2d 253 (1995). In the case at bar, factual development could and would justify recovery, particularly in light of the fact that the victim in this case is not available, due to her untimely death, making the discovery prohibition even more unjust.

The trial court accepted the Defendants-Appellants argument that the Plaintiff-Appellee

failed to allege all the necessary elements of the cause of action, even though the case law cited in Defendants-Appellants Brief were all MCR 2.116(C)(10) decisions. Specifically, the court held that Plaintiff-Appellee failed to identify specific factual instances of unwelcome conduct or communication based on gender, yet allowed the weight discrimination claim, apparently because Plaintiff-Appellee submitted an affidavit from Mary Granse supporting the weight claim. Again, under a MCR 2.116(C)(8) motion, the court is limited to the pleadings alone. However, Plaintiff-Appellee was held to a MCR 2.116(C)(10) standard. Furthermore, even if specific facts were required, Plaintiff-Appellee was precluded from obtaining them due to the Protective Order preventing discovery.

To avoid summary disposition, a complaint must contain allegations that are specific enough to reasonably inform the Defendant of the nature of the claim against which it must defend. *Porter v Henry Ford Hosp*, 181 Mich App 706; 450 NW2d 37 (1989). In *Goins v Ford Motor Co*, 131 Mich App 185; 347 NW2d 184 (1983). This decision also held that a complaint is sufficient if it gives notice of the nature of the complaint sufficient to allow the opposing party to take a responsive position.

Courts are not permitted to pass upon the credibility or weight to be attached to affiants or witnesses. As a result, summary judgment was intended to severely limit the circumstances in which it could be properly entered, by circumscribing unwarranted invasion by the court into the jury's exclusive province. *Durant v Stahlin*, 375 Mich 628; 135 NW2d 392 (1965). The granting of summary judgment is an unusual remedy and the proscribed procedure must be strictly followed. *Gloeser v Moore*, 284 Mich 106; 276 NW 781 (1938).

Further, the Michigan Court of Appeals in *Rose v Wertheimer*, 11 Mich App 401; 161 NW2d 406 (1968), held that a plaintiff is not required to aver any fact which is not necessary to

his right, nor state circumstances tending to prove facts alleged or character of evidence upon which he intends to rely, nor to anticipate matters of defense which the defendant may possibly set up. Plaintiff-Appellee in her First Amended Complaint has pled sufficient allegations to meet the above burden. Furthermore, because of the fact that the victim is deceased, the discovery prohibition limited the specific facts and dates the lower court required, since the decedent was not available to present them to her attorneys.

Finally, pursuant to MCR 2.116(I)(5): "If the grounds asserted are based on sub rule MCR 2.116(C)(8), MCR 2.116(C)(9) or MCR 2.116(C)(10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified. (emphasis added) *See also*, *Ben P. Fyke & Sons, Inc v Gunter Co*, 390 Mich 649; 213 NW2d 134 (1973). The lower court issued its order on July 8, 1998, and Defendants-Appellants did not answer the Amended Complaint until July 2, 1998. Therefore, Plaintiff-Appellee was denied the 21 day opportunity to amend her complaint. And, since the July 8th order dismissed the individually named Defendants-Appellants and the gender discrimination claim, Plaintiff-Appellee is left with no other means to correct any deficiencies than to dismiss its weight claim and appeal the prior dismissal of the gender discrimination/hostile environment claim.

In this case, the lower court has not only erroneously limited the scope of the Plaintiff-Appellee's claim by eliminating the gender discrimination/hostile environment claim but allowing the weight claim, but it has unjustly tied the Plaintiff-Appellee's hands because it prevented discovery, even though the victim is deceased.

Plaintiff-Appellee is not required under MCR 2.116(C)(8) to state specific instances of weight and gender hostile work environment claim. The Plaintiff-Appellee did not possess specific dates of sexual harassment or the specific language directed towards the decedent at the time the gender claim was dismissed. She is only required to make the allegation at this point

that the Plaintiff-Appellee was harassed because of her weight and gender. The cases cited in Defendants-Appellees' brief in support of their Third Motion for Summary Disposition that the lower court appeared to rely on were based on MCR 2.116 (C)(10) motions after discovery was completed. There was no discovery allowed at the time the lower court dismissed the gender claim. The lower court insisted that Plaintiff-Appellee provide specific dates and specific conversations which could have been provided through discovery.

Further, it appears that the trial court allowed the weight discrimination claim based upon the facts set forth in the affidavit by Ms. Mary Granse. However, Plaintiff also submitted an affidavit by Patricia Perreault in her Motion for Reconsideration and Rehearing that sets forth incidents of gender discrimination/hostile environment, yet the trial court ignored this evidence by denying a rehearing on its decision to dismiss the gender claim. Clearly, the trial court has held Plaintiff-Appellee to an unfairly high standard by relying on the Mary Granse's affidavit setting forth the weight discrimination claim, when a MCR 2.116(C)(8) motion is limited to the pleadings.

As a result, not only did the Plaintiff-Appellee meet a MCR 2.116(C)(8) burden, but with this information, she met a MCR 2.116(C)(10) burden as well. The information certainly raises issues of material fact whether or not the decedent was harassed because of her weight and gender. It also raises the issue that the harassment was sufficiently pervasive to create a hostile work environment.

CONCLUSION

The Appellant is requesting that this Court overturn *Koester* because it was wrongly decided. To cavalierly overturn a recent decision such as *Koester* and the other federal and state decisions that are in agreement with it would be bad public policy. The Plaintiff-Appellee has plead a prima facia case for hostile work environment based on sex.

RELIEF SOUGHT

Appellee requests that this Honorable Court uphold the decision of the Court of Appeals decision reversing the Circuit Court dismissal of the hostile work environment claim against the Defendants State of Michigan and the Michigan Department of State Police.

Respectfully submitted,

Dated: November 26, 2002

By: _____

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